Filed 11/20/08 P. v. Boyle CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KENNETH MICHAEL BOYLE, Defendant and Appellant.	B198875 (Los Angeles County Super. Ct. No. BA281610)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Joseph Shemaria for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Kenneth Michael Boyle of assault with intent to commit rape (Pen. Code, § 220)[1] and attempted kidnapping to commit rape (§§ 664/209, subd. (b)(1)). As to each crime, the jury found true the allegation that defendant personally used a knife. (§ 12022, subd. (b)(1).) The court sentenced him to six years in state prison. He appeals, contending: (1) the evidence was insufficient to support the convictions; (2) the trial court erred in two evidentiary rulings and in not giving a limiting instruction; (3) the trial court erred in not permitting defendant to stand when the jury entered the courtroom; and (4) defendant received ineffective assistance of counsel. We affirm.

FACTUAL BACKGROUND

1. *Prosecution*

Around 3:00 p.m. on April 10, 2005, Joan W., a student at Occidental College, was jogging on the sidewalk at the intersection of Figueroa and Colorado Boulevards near Pasadena. As she passed the driveway of a drugstore, a man, whom Joan identified at trial as defendant, rode his bicycle directly in front of her, cutting off her path. Joan kept running on Colorado, and came to a vacant area covered by trees, weeds and shrubs adjacent to a hillside. There were no businesses on that side of the street for perhaps half a mile to a mile. She passed a large red tractor trailer with the name "England" on the side. As she did so, defendant jumped out onto the street from the area between the truck cab and cargo trailer. He held a small knife in his left hand, blade out. His erect penis was exposed. With his knife hand, he grabbed Joan by the wrist; with the other, he began masturbating. He pulled her toward the tractor trailer, saying, "Come on, baby." Although she wasn't sure of what he said next, she believed it was

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[1] All undesignated section references are to the Penal Code.

something like “get in the truck.” Joan noticed that the bicycle on which defendant had been riding earlier was leaning against the truck. Joan struggled for 15 to 30 seconds, and finally broke free.

Feeling in shock, she ran to her dorm room, where she noticed that her arm was bleeding from a small cut she had received from the knife during the struggle. After taking a shower and putting a band aid on the cut, she called her boyfriend, Robert Wicklund, and told him what had happened. She was scared and confused, and did not know what to do. Driving on the way to Joan’s dorm, Robert stopped to get the license plate number of the tractor trailer Joan described. He then picked Joan up and took her to his home.

Joan asked him to call 911. He did so and at times relayed information from Joan to the operator, trying to repeat the information verbatim. Joan gave a basic description of the perpetrator to Robert and the 911 operator – Hispanic male (though she was unsure), wearing a plaid or checkered shirt (black and white in color), and tan, khaki, or light denim pants. Joan also said that the man had been outside the truck, that the cab door was open, and that he was trying to pull her in.

Los Angeles Police Officers Juan Chavez and Juan Amancio responded to Robert’s house. Joan told them that the attacker wore a plaid or checkered shirt with dark and light colors, and light colored pants. She described the man as approximately 5 feet 10 inches tall, weighing 180 pounds, between 40 to 45 years old, with dark “bushy” or “curly” hair. Robert gave the officers the license plate number of the tractor trailer.

The officers left for a short time, then returned. They took Joan and Robert to the scene of the attack, where Joan saw the red tractor trailer again, and also saw that shrubs and grass between the cab and cargo trailer of the truck had been flattened where the struggle occurred. She also noticed that the door to the cab was obstructed by tree branches and could not be opened all the way. Joan

believed that defendant must have come at her from between the cab and cargo box, although she had earlier told the 911 operator and police officers that she thought he had come from the truck cab and was trying to get her into the truck. Officer Amancio verified the license plate number of the truck trailer.

As they were driving away, Officer Amancio spotted defendant sitting at a table outside a McDonald's restaurant on Figueroa. Defendant wore a plaid shirt and light colored pants. He had bushy hair, and a bicycle was next to him. Officer Chavez pulled the patrol car into the parking lot, and the officers told Joan that they had spotted someone who fit the description of her attacker. They got out and handcuffed defendant. Officer Chavez returned to the car and gave Joan an eyewitness identification admonishment. Joan instantly recognized defendant as her attacker. She had no doubt. She also saw, leaning against a table or pole, the bicycle defendant had been riding. Officer Amancio recovered a Pell folding knife from defendant's pocket. At trial, Joan testified that the knife seized from defendant looked like the knife used by her assailant, with the same length blade.

On May 17, 2005, at a six-person lineup, Joan identified defendant again. She was positive and immediately recognized him. She also positively identified him at the preliminary hearing and at trial.

2. *Defense*

Defendant's brother, Daniel Boyle, testified that around 4:30 p.m. on the day of the incident, defendant was at home in Eagle Rock. Defendant was ironing a plaid shirt and wearing blue jeans. Defendant was approximately 35 years old, and had long hair and facial hair. He used a bicycle for transportation.

Dr. Robert Shomer, an expert on eyewitness identification, testified concerning common problems and misconceptions regarding eyewitness identifications. Timothy Williams, a former Detective Supervisor for the Los

Angeles Police Department, testified on the need for police investigators to document evidence and stated that detectives have the authority to have evidence tested.

DISCUSSION

1. *Sufficiency of the Evidence*

Defendant contends that the evidence was insufficient to support his convictions of assault with intent to commit forcible rape and attempted kidnapping to commit rape. We disagree.

The crime of assault with intent to commit forcible rape requires, inter alia, the defendant have the specific intent to have intercourse against the will of the victim. (*People v. Maury* (2003) 30 Cal.4th 342, 399-400.) Defendant contends that the evidence is insufficient to prove that he intended to forcibly rape Joan W. Viewed under the proper standard of review (see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence was more than sufficient. As Joan W. was jogging, she passed a tractor trailer parked adjacent to a vacant lot covered with grass, shrubs, and trees. There were no businesses on that side of the street for perhaps a mile. Defendant jumped out from between the truck cab and trailer holding a knife and with his penis exposed. He grabbed Joan by the wrist with his knife hand and began masturbating with the other. He pulled her toward the tractor trailer, saying, "Come on, baby," and other words that Joan understood to be something like "get in the truck." Joan struggled for perhaps 30 seconds, suffering a small cut from the knife in the process, and finally broke free.

From this evidence, the jury could draw the common-sense inference that defendant, using a knife to overcome Joan's will, intended to force Joan W. to a secluded spot somewhere in the vacant lot behind the truck and force her to submit to sexual intercourse.

Defendant also contends that the evidence is insufficient to support his conviction of attempted kidnapping to commit rape. To commit the crime of attempted kidnapping, the defendant must do a direct but ineffectual act towards the commission of a kidnapping, with the specific intent to kidnap. (*People v. Cole* (1985) 165 Cal.App.3d 41, 47-48.) The crime does not require proof that the defendant moved the victim a substantial distance; rather, the prosecution need only show that the defendant attempted to move the victim a substantial distance. (*Id.* at p. 50 ["the distance [the victim] was moved is immaterial -- asportation simply is not an element of the offense"].) The issue of whether the defendant had specific intent to commit an attempted crime presents a question of fact that may be inferred from circumstantial evidence. (*Id.* at p. 48.)

As we have noted, the evidence is sufficient to infer that defendant intended to move Joan to a secluded area behind the tractor trailer for the purpose of raping her at knifepoint. This evidence is sufficient to prove that he attempted to move her a substantial distance – a distance that would, considering all the circumstances, substantially increase the risk of harm to her (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151-1152). That she escaped before he was able to accomplish his goal does not make the evidence of attempted kidnapping for the purpose of rape insufficient.

Pointing to discrepancies in Joan's description of her attacker and other aspects of the evidence (including the testimony of the defense expert, Dr. Shomer), defendant contends that the evidence was insufficient to prove that he was the attacker. Defendant would have us reweigh the evidence, a task an appellate court does not undertake. (*Ochoa, supra*, 6 Cal.4th at p. 1206.) Here, Joan W. positively identified defendant at an in-field show-up within three hours after the attack. She also positively identified him at a lineup approximately six weeks later, at the preliminary hearing, and at trial. She testified that the knife

seized from defendant looked like the knife used by the attacker, and that the bicycle defendant had been riding before the attack was present when she made her in-field identification. Her testimony constitutes strong evidence proving defendant's identity as the perpetrator.

2. *Evidentiary Rulings and Limiting Instruction*

Defendant contends that the trial court erred in two evidentiary rulings, namely: (1) permitting Detective David Roeder (the investigating officer) and Officers Chavez and Amancio to testify that that they believed the tractor trailer was not involved in the crime; and (2) limiting defendant's cross-examination on the subject. He also contends that the court erred in failing to give a limiting instruction on the officers' testimony. We find no error.

In her opening statement, defense counsel accused the police of performing an inadequate investigation, including failing to follow up on information concerning the tractor trailer: "[T]he police did such a bad job. It's not merely even the license plate that the boyfriend gave [which Officers Chavez and Amancio lost]. They didn't even take a picture of the . . . truck."

In light of the defense theory, the prosecutor elicited testimony to explain why the police did not perform a more intensive investigation of the tractor trailer and determine who owned it. Thus, Joan W. testified that she initially told the police officers that her attacker had come from the truck cab and was trying to get her into the truck. However, after revisiting the scene with the police officers, she realized that defendant was not in the cab and must have come at her from between the cab and cargo box. She was also unsure that the attacker had told her to get in the cab.

Over defense objection, Officer Chavez and Detective Roeder testified, in substance, that based on Joan W.'s statements, they concluded that the tractor

trailer was not involved in the crime other than being parked at the site of the attack. Officer Amancio gave similar testimony, without defense objection.

Because defendant failed to object to Officer Amancio's testimony, he has forfeited any objection to it on appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 666 (*Holt*).) In any event, Officer Amancio's testimony, and that of Officer Chavez and Detective Roeder, was admissible to explain why the police did not aggressively investigate the possibility that the tractor trailer and its owner were somehow connected to the crime. In short, the testimony showed that their failure to thoroughly investigate the tractor trailer was not because of laziness or a rush to judgment, as contended by the defense, but rather a reasoned decision based on their evaluation of the circumstances of the crime.

Defendant, assuming the testimony was admissible, contends that the trial court should have instructed, sua sponte, that the testimony "was only offered to explain why documentation [concerning the truck] was lacking, not as evidence that any offense was not intended to take place in the tractor." However, a trial court has no sua sponte duty to instruct on the limited admissibility of evidence. (Evid. Code, § 355.)

Defendant contends that the trial court violated his Sixth Amendment right to confront and cross-examine witnesses by limiting defense counsel's cross-examination of the police officers. He refers to a single page of the reporter's transcript in which the trial court sustained an objection to defense counsel's question of Officer Amancio, "[Y]ou're not sure that the person who was involved in the assault was not connected to the truck, are you?"

Defendant fails to cite to any portion of the record containing cross-examination of Officer Chavez and Detective Roeder. He therefore has forfeited any argument that his cross-examination of those witnesses was improperly limited. (*Holt, supra,* 15 Cal. 4th at p. 666.) As to the single ruling to which he

refers in the testimony of Officer Amancio, he simply asserts that "[c]ross examination on this subject was critical to [defendant's] defense that he could not be the suspect because he did not have keys to the tractor and the crime was intended to take place in the tractor." Defendant implies that the trial court cut off all cross-examination of Officer Amancio's testimony concerning whether the tractor trailer was involved in the crime. To the contrary, defense counsel cross-examined Officer Amancio at length concerning statements in his police report suggesting that the truck was connected to the assailant. Further, Officer Amancio acknowledged on cross-examination that Joan W. did not withdraw her statement that the assailant told her to get in the truck. Thus, defendant's cross-examination of Officer Amancio was not improperly restricted.

3. *Not Permitting Defendant to Stand*

During jury voir dire, outside the prospective jurors' presence, defense counsel asked that defendant be allowed to stand when the jurors entered the courtroom. Defense counsel argued that if defendant remained seated while the attorneys stood, it would communicate to the jury that defendant was in custody, or that he was disrespectful. The trial court denied the request, stating that it left security matters in the hands of the bailiff, and noting that it was apparent defendant was in custody because he was not present in the hallway with the jurors before court was in session.

The next day (still during voir dire), defense counsel filed a written motion to allow defendant to stand and face the jurors as they entered. The trial court again denied the request, suggesting that one of defendants' attorneys (he was represented by two) remain seated with defendant. The court also noted that defendant was not shackled, so the jury was unlikely to relate his remaining seated to his custodial status.

On appeal, defendant contends that the court's rulings (unsupported by articulated facts) communicated to the jury that defendant was a security threat. Defendant analogizes his situation to that of defendants required to appear in jail clothing or in shackles. The analogy is inapt. Defendant was dressed in civilian clothes and was not shackled. Nothing in the record indicates that the courtroom bailiff acted in such a way in the jury's presence as to intimate defendant was a danger. Further, it is entirely speculative to suggest that the jury inferred defendant was a danger simply because he did not stand when the jury entered to courtroom. Defendant cites no authority, and we are aware of none, holding that not permitting a defendant to stand when the jury enters the courtroom violates his due process rights.

4. *Ineffective Assistance of Counsel*

Defendant raises various claims of ineffective assistance of counsel. None has merit.

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants. We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. [Citations.] A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, "'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of

the alleged deficiencies.' [Citation.]"' [Citation.]" (*Holt, supra,* 15 Cal.4th at p. 703.)

a. *Suppression Hearing*

Defendant contends that by failing to elicit evidence of certain facts, his trial counsel was ineffective at the hearing on his pretrial motion to suppress evidence. The cited facts, however, some of which were not omitted, are immaterial.

Defendant's motion sought to suppress Joan W.'s pretrial identifications of defendant and the knife found on his person on the ground that they were the product of an unlawful detention made without reasonable cause. At the hearing, the prosecution called Officer Amancio, who testified that when he met Joan W. she described the attack (including that the assailant rode a bicycle) and gave a description of the man. Joan described him as a male Hispanic with curly or bushy brown hair, approximately 5 feet 10 inches tall and weighing approximately 180 pounds. She also said that he was 35 to 40 years old, wearing a black and white long sleeved checkered shirt and brown or light colored pants.

Officer Amancio testified that he and his partner later drove Joan and a male companion to the scene of the incident to go over the details. As they were driving away, he saw defendant seated at an outdoor table at a McDonald's, perhaps half-a-block away. Officer Amancio believed defendant fit Joan W.'s description based on his clothing, his bushy hair, and the presence of a bicycle next to him. Defendant appeared to be Hispanic and between 35 and 40 years old. Officer Amancio and his partner detained defendant and handcuffed him because Joan had said her attacker was armed with a knife. In a patdown search, they found a knife on his person. They then conducted a field show-up, at which Joan identified defendant. Officer Amancio testified that the assault occurred around 3:00 p.m.,

and defendant's arrest occurred around 6:30 p.m. The prosecutor introduced a photograph of defendant as he appeared when he was detained.

On cross-examination of Officer Amancio, defense counsel elicited testimony: (1) that defendant was wearing blue pants, not brown or light-colored pants as described by Joan; (2) that Joan had not described the assailant's bicycle and (3) that defendant was seated so the officer could not tell how tall he was. Defense counsel sought to call Joan W. to testify, inter alia, about her description of the assailant, but the court denied the request.

On the merits of the suppression motion, defense counsel argued that Officer Amancio had insufficient cause to detain defendant based solely on the fact that he wore a checkered shirt, had curly hair, and was seated outside a McDonald's a substantial distance away from where the attack had occurred more than three hours earlier. The trial court denied the motion.

On appeal, defendant contends that his trial counsel was incompetent at the hearing for not eliciting testimony concerning four facts that, according to defendant, reasonably might have made a difference in the trial court's ruling. First, he contends that although trial counsel elicited testimony that defendant was wearing blue pants when arrested, counsel failed to elicit testimony that Joan had described her attacker as wearing tan or khaki pants. The point is frivolous. Officer Amancio testified at the hearing that Joan had described her attacker as wearing brown or light-colored pants. Obviously, defendant's blue pants were different in color from those described by Joan, whether she described them as brown, light colored, tan, or khaki.

Second, defendant contends that although Joan had not described her assailant as having facial hair, defense counsel failed to elicit testimony that defendant had a goatee. Defendant overlooks the fact that the prosecution introduced into evidence a photograph of defendant as he appeared when he was

detained. The photograph (which defendant has failed to make part of the record on appeal) would presumably show the goatee, if, indeed, it was a significant feature of defendant's appearance when he was detained.

Third, defendant contends that counsel was incompetent for not eliciting testimony that defendant weighed 149 pounds, whereas Joan described her assailant as weighing approximately 180 pounds. Officer Amancio testified that defendant, when the officer observed him, was seated and appeared to weigh around 180 pounds. Given that defendant was seated rather than standing, evidence that defendant weighed 149 rather than 180 pounds was of little value in determining the validity of the detention. Further, as mentioned, the prosecutor introduced a photograph of defendant as he appeared when detained. Adequate evidence was thus presented for the court to judge whether the officer was reasonable in believing that defendant's overall appearance, including his weight, was sufficiently similar to Joan's description of the assailant as to justify the detention.

Finally, defendant argues that although Joan described the assailant's shirt as long-sleeved with black and white checks, defense counsel failed to elicit testimony at the suppression hearing that defendant's shirt was short-sleeved with green and white checks. Defendant's assertion of the appearance of the shirt is based on trial testimony. At trial, the prosecution introduced the shirt. As described at trial by Officer Chavez (Officer Amancio's partner), the shirt was white and dark green. He also testified, however, that it looked black and white in the lighting at McDonald's when defendant was wearing it. As defendant concedes on appeal, "admittedly a dark green and white checked shirt could resemble a black and white checked shirt." He asserts, however, that the critical fact was that the shirt was short-sleeved. At the suppression hearing, defense counsel asked Officer Amancio whether he recalled that defendant was wearing a

short-sleeved shirt. The officer testified that he did not recall. It is unclear from the record whether the photograph of defendant introduced at the hearing showed that his shirt was short-sleeved. Nonetheless, that the shirt was short-sleeved did not defeat the reasonableness of the detention. Indeed, none of the omitted facts cited by defendant facts undermined the propriety of the detention. A brief detention of a suspect for questioning or other limited investigation is valid if "the circumstances known or apparent to the officer . . . include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity." (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) The court must evaluate the reasonableness of the detention in light of the totality of circumstances. (*United States v. Arvizu* (2002) 534 U.S. 266, 273.)

Here, within approximately three hours of the attack, defendant was discovered at a McDonald's restaurant not far from the scene. Joan's assailant had ridden a bicycle; next to defendant at the McDonald's was a bicycle. Joan had described the assailant as Hispanic, 35 to 40 years old, with bushy hair; defendant appeared to have each of those characteristics. Joan had described the assailant as wearing a black and white checkered shirt. Defendant wore a checkered shirt, apparently dark green and white, that appeared black and white in the lighting at McDonald's. These articulated facts were certainly adequate to reasonably suspect that defendant might be Joan's attacker even in light of the minor discrepancies on which defendant relies. Thus, the articulated facts alone justified defendant's detention. Even if defense counsel's performance at the suppression hearing was deficient, therefore, it is not reasonably probable that a different result would have been reached on the motion to suppress.

b. *Failure to Object to Testimony*

At trial, Detective Roeder testified about his approach to investigating sex crimes. One of the things he mentioned was that "when there is someone in custody, you attempt to interview the person in custody." Defense counsel did not object. Detective Roeder later testified that in the present case, "prior to going and speaking with or attempting to speak with the defendant, going to the jail division, I ran his rap sheet." Defense counsel objected on the ground of hearsay (although no hearsay was involved), and the court sustained the objection.

On appeal, defendant contends that that the testimony communicated to the jury that defendant had invoked his right to remain silent. He also asserts that defense counsel was incompetent for failing to effectively object to it. Even if counsel was deficient in failing to object to the first portion and in objecting on the wrong ground to the second, the testimony did not reasonably suggest that defendant invoked his right to remain silent and refused to speak to Detective Roeder. It certainly did not amount to a comment on his right to remain silent; the subject was not even mentioned in the prosecutor's closing argument. There is no reasonable probability that these brief snippets of testimony had any effect on the verdict.

c. *Failing to Request a Limiting Instruction*

Defendant contends that trial counsel was incompetent for failing to request a limiting instruction on the testimony by Detective Roeder and Officers Amancio and Chavez that they believed the tractor trailer was not involved in the attack on Joan W. Such a limiting instruction would have explained that the testimony was to be considered only as relevant to explain why the police did not conduct an investigation of the tractor trailer. Assuming that counsel was deficient for not requesting such an instruction, it is not reasonably probable that a different result

would have been reached. Contrary to defendant's contention, the trial evidence against defendant was not weak. Joan W. positively identified defendant at an in-field show-up within three hours of the attack. She also positively identified him at a lineup approximately six weeks later, at the preliminary hearing, and at trial. She also testified that the knife found on defendant by Officer Amancio looked like the knife used by the attacker, and that the bicycle defendant had been riding before the attack was present when she made her in-field identification. She believed that she was mistaken when she told the police that the assailant was trying to get her into the truck. In light of Joan's testimony and the strength of her identifications of defendant, there is no reasonable probability that the court's giving of a limiting instruction on the police testimony would have produced a different result.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.